FOR ARGUMENT

Supreme Court, U. S.
F I L E D
MAR 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*
v.
LARRY G. HARDISON, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## REPLY BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
1900 M Street, N.W.
Washington, D. C. 20036

MICHAEL D. GORDON
1125 Grand Avenue
Kansas City, Missouri 64106

*Attorneys for Petitioners International Association of Machinists and Aerospace Workers, et al.*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

## INDEX


Page

INTRODUCTION—The Real Issues ..... 1

I. STATUTORY CONSTRUCTION AND RELATED FACTUAL ISSUES ..... 4

II. CONSTITUTIONAL ISSUES ..... 15

CONCLUSION ..... 37

APPENDIX—Statutes and Regulations cited in Synagogue Council Brief, p. 21, as establishing "the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations" ..... 1a


## AUTHORITIES CITED


CASES:

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 21, 23, 24, 25, 35

Action v. Gannon, 450 F.2d 1227 (8 Cir. 1971) ..... 27

American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921) ..... 3

Board of Regents v. Roth, 408 U.S. 564 (1972) ..... 3

Braunfeld v. Brown, 366 U.S. 599 (1961) ..... 26

Buckley v. Valeo, 424 U.S. 1 (1976) ..... 24

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) .. 31

Case, J. I. Co. v. Labor Board, 321 U.S. 332 (1944) ... 2

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) ..... 15, 16, 17, 18, 19, 21, 22, 26, 33, 37

Cummins v. Parker Seal Company, 516 F.2d 544 (6 Cir. 1975), aff'd by an equally divided Court, 45 L.W. 4009 (Nov. 2, 1976) .....4, 18, 32

Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971)..30, 33

Page

Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952) ..... 24

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6 Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971) ..... 4, 5

Everson v. Board of Education, 330 U.S. 1 (1947) .21, 24, 28

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) ..... 10

Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) ..... 27

General Electric Co. v. Gilbert, 45 L.W. 4031 (1976).. 11, 14, 15

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..8, 9, 14, 22

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) ..... 29

McGowan v. Maryland, 366 U.S. 420 (1961) ..... 26

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) ... 29

NLRB v. Fruit Packers, 377 U.S. 58 (1964) ..... 8

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) ..... 2

Perry v. Sindermann, 408 U.S. 593 (1972) ..... 3

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 14

Regional Rail Reorganization Act Cases, 419 U.S. 134 (1974) ..... 15

Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla., 1971) ..... 4, 5

Roemer v. Board of Public Works of Maryland, 426 U.S. 736 .....13, 21

Sherbert v. Verner, 374 U.S. 398 (1963) ..... 27

Sloan v. Lemon, 413 U.S. 825 (1973)...15, 16, 17, 18, 29, 33



Page

Speiser v. Randall, 357 U.S. 513 (1958) ..... 28

Walz v. Tax Comm'n, 397 U.S. 664 (1970) ..... 13

Wisconsin v. Yoder, 406 U.S. 205 (1972) ..... 26

Yott v. North American Rockwell Corporation, et al., 14 F.E.P. Cases 445 (C.D. Calif., Feb. 3, 1977) ... 18, 20, 23

Young v. Southwestern Savings & Loan Assn., 509 F.2d 140 (5 Cir. 1975) ..... 22

Zorach v. Clauson, 343 U.S. 306 (1952) .....25, 26

UNITED STATES CONSTITUTION:

First Amendment .....*passim*
Fourteenth Amendment ..... 29

STATUTES:

29 U.S.C. § 793(a) ..... 13

42 U.S.C. 2000e, Civil Rights Act of 1964 as amended, Title VII

Section 701(j) .....2, 4, *passim*
Section 703(a) ..... 8
Section 703(h) .....6, 9, 10, 15
Section 703(j) .....8, 15
Section 706 ..... 10

MISCELLANEOUS:

5 C.F.R. Section 713.204(g) ..... 30

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*
v.
LARRY G. HARDISON, *Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## REPLY BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS*

### INTRODUCTION

#### The Real Issues

A principal contention of our adversaries is that because we insist that the rights of employees under

* In addition to the Brief for Respondent, referred to hereinafter as "R. Br.," seven briefs *amici* have been submitted in support of respondent's position. They are referred to as follows: United States and Equal Employment Opportunity Commission, "Gov't"; Seventh Day Adventists, "Adventists"; Central Conference of American Rabbis, et al., organizations affiliated with the Synagogue Council of America and the National Jewish Community Relations Advisory Council, "Synagogue Council"; COLPA; Worldwide Church of God, "Worldwide"; New York State Division of Human Rights, "New York", and the State of Michigan". We refer to our opening Brief as "U. Br."

a collective bargaining agreement be preserved, we are elevating the agreement above the statute. (R. Br. p. 11; Adventists Br. p. 56; COLPA Br. p. 28.) Not so. Of course we recognize that rights under a collective bargaining agreement, like other contractual rights and property interests in general, are "subject to modification by law" (Adventists Br. p. 56). What we do contend is that Congress did not, in § 701(j), choose to modify or abrogate those rights of employees. By falsely imputing to us a hierarchy of values which elevates the agreement above the statute, where these are in conflict, our adversaries evade the basic statutory issue, which is whether § 701(j) does conflict with employee rights under a collective bargaining agreement. And they also place in a false light the constitutional issue, which is whether under the Establishment Clause the rights of some employees may be abrogated in order to facilitate religious observance by others.

It is well also to have in mind at the outset why the issue is stated in terms of employee rights under a collective bargaining agreement. It is not because rights under a collective bargaining agreement have any greater legal dignity than rights created by an individual contract between an employer and an employee where there is no collective agreement.[1] In

[1] Of course, where there are both individual and collective agreements, the latter must prevail, *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 338-339 (1944); *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346-347 (1944). COLPA's disparaging reference to the Union's refusal on principle to allow exceptions to its hard-won contract rights (Br. p. 33), and similar references by respondent and other *amici,* betrays either unfamiliarity with or disdain for the rationale of collective bargaining, which is at the root of our national labor policy. Neither the language nor the legislative history of § 701(j) gives any indication that Congress intended to modify that policy or to subordinate rights under collective agreements to the interests of individual employees.



either event, the agreement creates a property right in the employee. See *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 601-602 (1972). Thus, we answer in the negative the rhetorical question: "Is the contract between the employer and the representative of a majority of its employees entitled to greater weight than the express or implied terms of an individual employment contract?" (COLPA Br. p. 28.)

The reason our position is stated in terms of rights under a collective bargaining agreement is two-fold: First, and most obviously, the employee rights involved in this case are, in fact, created by a collective bargaining agreement. Second, as a matter of industrial reality, it is probably only in collective bargaining agreements that one finds provisions which, expressly or by implication, create in employees seniority rights or in any other way diminish the employer's managerial prerogative to establish working conditions, including the authority to determine which employee will work when. Individual employees rarely, if ever, have the bargaining power to restrict the employer's total authority to assign work; this is "the necessit[y] of the situation" which, as Mr. Chief Justice Taft long ago recognized, leads to organization by employees. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209 (1921).

Thus, COLPA's question is not only rhetorical, but of merely academic interest. What is important, indeed what is at the heart of the constitutional and statutory issues in this case, is the circumstance that this case *does* involve the collective bargaining rights of non-Sabbatarian employees. It is the presence of these employees and their collective bargaining rights which creates in this case statutory and constitutional

issues which were not before the Court in *Parker Seal Co.* v. *Cummins,* nor (as we shall develop at pp. 4-5 *infra*) in *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971). It is perhaps the most notable characteristic of the briefs on respondent's side that they largely, and in most instances entirely, ignore this essential difference. They thereby evade the basic issues in this case. Our reply will begin by responding to the one argument (consisting of a single paragraph) which does squarely confront our position. We then discuss those of our adversaries' arguments which, while not directly addressed to, can be said to touch upon the real issues.

## I. STATUTORY CONSTRUCTION AND RELATED FACTUAL ISSUES

A. The only brief on the other side which even addresses the statutory issue we raise is that of the Adventists, who assert (Br. 56), that "there is no doubt that Congress expected the reasonable accommodation requirement to override provisions of collective bargaining agreements that would block accommodations." The only evidence they cite in support of that assertion is Sen. Randolph's inclusion in the Congressional Record of the decisions in two cases, *Dewey* v. *Reynolds Metals Co.,* 429 F.2d 324 (6 Cir., 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971), and *Riley* v. *Bendix Corp.,* 330 F.Supp. 583 (M.D. Fla., 1971). We may assume that Sen. Randolph intended that by virtue of § 701(j) the plaintiff should prevail "in situations like those in *Dewey* and *Riley*" (Adventists Br. p. 57). But the situation here is not like that in those cases. For the courts in both assumed, as the Adventists say (*id.*), that "a collective bargaining agreement required *all* employees to be



available for work on weekends". (Emphasis added.) Thus, the collective bargaining agreements did not *"block accommodation"* because accommodation did not entail modification or abrogation of any rights of any non-Sabbatarian employees. In this case, however, the agreement did *not* provide that all employees must be available to work overtime or on weekends, but rather gave some employees a right to refuse such work on the basis of seniority, and created other pertinent employee rights. Thus, the legislative history which the Adventists cite is simply irrelevant because it does not establish that Congress intended to "override provisions of collective bargaining agreements *that would block accommodations*" (*Id.* 56, emphasis added), *i.e.*, provisions which create conflicting employee rights.

Another conflicting right of the employees in this case, which those in *Dewey* and *Riley* did not bargain for, is the right to bump in, on the basis of seniority, to permanent job openings created when an employee vacates his job voluntarily to take another. (U. Br. 9.) In *Dewey*, the court specifically found that "swaps", voluntary exchanges, were "an alternate procedure under the contract." 429 F.2d at 330. In *Riley,* swapping was not an issue.[2]

---

[2] Adventists concede (Br. p. 61) that a swap would have been "consistent with the seniority assignment system" only "[i]f no one more senior than Hardison wanted the 'graveyard' shift and no one more senior [than the employee willing to swap with Hardison] wanted Hardison's shift * * * *." Where, as here, there were potentially 200 or more qualified seniors (A.24, 68, 104, 133-134), ascertainment whether any had an interest in bumping into either job was obviously feasible only by posting, i.e., putting the jobs "up for bid" (A. 84).

COLPA objects (Br. p. 29) that Hardison was "required to be available on" Saturdays although "he might [have been] able

B. The Adventists, joined on this point by respondent and the Government, state that the purpose of § 701(j) was to approve the EEOC's 1967 Guidelines

to 'bid' out of Saturday work." But Hardison conceded that he did not have the requisite seniority to bid out of Saturday work, and, that, in any event, there was no job not requiring Saturday work he could have bid into (A. 92).

While respondent criticizes the Union's unwillingness to destroy the right of senior workers to an opportunity to bump into jobs involved in a "swap" (Br. pp. 16, 19), he does not even suggest that that unwillingness was discriminatorily motivated. Nor does he attempt to explain (p. 17) how destruction of that right can be reconciled with the plain language of § 703(h), which encompasses all privileges and expectations created by "bona fide seniority • • • system[s]." The Government, which declares that the "seniority system would not be seriously compromised" (Br. pp. 25, 29), offers no such explanation either.

The Adventists would dispose of the conflict by terming expectations of the senior employees not "significant," "substantial," or "serious" (Br. pp. 15, 39, n. 8, 60, 61); but these characterizations are at odds with common knowledge, with this Court's appraisals in *Franks*, (Br. p. 49), and contrast strangely with the overwhelming importance Sabbatarians attach to their own rest days off.

The argument that the Union *should* have waived the contract right of seniors in order to afford a non-contractual preference to Sabbatarians (R. Br. 16; Adventists Br. 14, 56) begs the very question in issue, namely, whether it was *required* to do so by the statute, constitutionally construed (A. 224).

The fact that accommodations were made for occasional absences (A. 134) and for religious holidays (A. 120), and pursuant to occasional recommendations of the Union Relief Committee, does not establish, and the courts below did not find (A. 228-231, 261), that Hardison's permanent religious need was discriminated against, for the record shows (A. 130-131, 134-135, 143-144), that the province of the Committee was limited to exigencies created by temporary "health and family involvements" (A. 131), generally involving adjustments for not more than ninety (90) days (A. 144). It does not appear that the Relief Committee was empowered to or ever did recommend a permanent accommodation which circumvented the right of a senior employee to an opportunity to bid into a job.



(Adventists Br. 46-48; Gov't. Br. p. 16, n. 5; R. Br. 24-26). That proposition does not materially advance their position, because it merely leads to the questions whether the 1967 Guidelines required sacrifice of the rights of one employee to the advantage of another, and whether Congress perceived the 1967 Guidelines as having that effect. Neither their brief nor any other responds to our demonstration that the 1967 Guidelines do *not* provide that the duty to accommodate encompasses a duty to obliterate one employee's contract rights to facilitate the religious practices of another (U. Br. 36-40). The failure of the EEOC to deal with this point is, we submit, particularly revealing. And again, notwithstanding the discussion at U. Br. 43-47, our adversaries simply *assume* that Congress, in ratifying the 1967 Guidelines, understood them to encompass that duty and intended to enact that understanding. While reference is made to Sen. Randolph's statement in introducing § 701(j), we showed in our opening brief that he said nothing from which it could be concluded that he wished to grant Sabbatarians (or other religious observers) a statutory right superceding contractual rights of other employees. And we have shown earlier in this Reply, pp. 4-5, that his reference to *Dewey* and *Riley* does not touch this case either.

There are, in fact, two particularly significant aspects of Sen. Randolph's explanation of § 701(j). The first, which our adversaries perforce attempt to minimize, is that he wished to promote church attendance among Sabbatarians. The second is that he did not state that the exercise of religious beliefs was to be protected regardless of anything else, or specifically that it was intended to override competing rights of

other employees. This in itself is strong evidence that no such meaning should be ascribed to § 701(j). "The silence of the sponsors is pregnant with significance * * * ." *NLRB* v. *Fruit Packers,* 377 U.S. 58, 66 (1964). It is safe to say that § 701(j) would not have been noncontroversial if it had been understood as creating a preference for one group of employees over another because of their religious beliefs or if it had been understood that by the Amendment Congress would, to that extent, depart from the basic understanding of what is and what is not discrimination under Title VII, see pp. 8-15 *infra.* Indeed, against this background, a Senator introducing an amendment which was intended to use "discrimination" in a new and special sense would have been obligated, as a matter of elementary candor, to so state to his colleagues.

C. None of the briefs on respondent's side so much as mentions § 703(j) of the Act which complements § 703(a)'s prohibition of *discrimination against* any employee because of his religion by forbidding also the granting of a *preference to* any employee because of his religion. Nor do they deal with our showing (U. Br. pp. 30-36), that, consistent with the rule of neutrality embodied in § 703, *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), recognized that Title VII does not permit, let alone require, rules which favor one group of employees over another because of religion. This omission in our adversaries' briefs is particularly significant since several of them place heavy reliance on *Griggs,* as they misread that precedent.

*Griggs* concerned the competition between black and white employees for job openings. This case concerns the competition between Sabbatarian and non-Sabbatarian employees for job assignments that do not require undesired Saturday work. Respondent's side would read *Griggs*' "effects test" to mandate that the rules governing such competition must assure that minority groups shall prevail. But the *Griggs* opinion states that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group" (401 U.S. at 431). Thus, the position that "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (*id.*) does not lead to the conclusion that the rules governing job competitions must favor any group of employees because of their minority status or religious beliefs; rather, it establishes that such rules must provide all groups what is in fact an equal opportunity to secure the benefit in question. As *Griggs* held, and as § 703(h) makes perfectly clear, this means that when a test is used it must be job related. And, as § 703(h) also shows, it means that when the competition is decided on the basis of length of tenure, a uniform neutral "bona fide seniority * * * system" must be used. What the Act assuredly does not mean is that only rules that require non-Sabbatarians to do all undesired Saturday work are lawful.



Adventists do argue, however (Br. pp. 15, 54, 55), that § 703(h) affords no immunity because it is "not intended to define what practices constitute present violations of the main statutory provisions" (p. 15), but (pp. 54-55):

> "*is merely* 'directed toward * * * instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date

of the Act,'" citing *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1975). (Emphasis added.)

But that is a misreading of *Franks*. That case assumes that § 703(h) was included in the Act to preclude a substantive finding of discrimination by application of a bona fide seniority system and does not *merely* insulate such a system where there is no pre-Act discrimination, as there was none here.[3] The Court there overrode seniority rights only as a §706 remedy for proven discrimination.

Adventists would have it that there *is* past and current "discrimination in effect" here simply because the uniform, relevant, work availability requirement has a "disparate effect" on religious observers (*id.*, p. 55). But equation of "disparate effect" *per se* with "discrimination" is unexplicated and unjustified. Nowhere do respondent or any of its *amici* respond to our demonstration that discrimination consists as much of overlooking differences in relevant qualifications, or declaring relevant qualifications irrelevant, as of disparate treatment of those equally qualified in relevant respects. (U. Br., pp. 33-36, 68-69). The problem is evaded by majestic *ipse dixit:* "Whether the [uniform, neutral employment] practices relate to job qualifications or work schedules [which the religious observer flouts] is irrelevant." (Adventists Br. p. 29.) Thus, the entire opposition theory depends upon this Court's acceptance of an Orwellian inversion of the definition of "discrimination."

[3] COLPA concedes this point (Br. p. 29), but argues that the exception for remedial relief implied in *Franks* should result in bestowing on "an observant employee the kind of accommodation that an employer might have available." But that overlooks that absent discrimination *no* relief is warranted, so that the issue remains whether non-discriminatory application to religious observers of a neutral, uniform, availability for work requirement constitutes discrimination.

The Government inaccurately asserts (Br. p. 30), that to give effect to § 703(h) in relation to § 701(j) would make the Act "self defeating." The fact that a general exemption reduces the arguable reach of a subsequent amendment which does not expressly repeal the exemption cannot justify judicial revision of the exemption to expand the effect of the amendment. This Court is not a revisory legislature.



Adversary *amici* argue (Adventists Br. pp. 36-37; Synagogue Council Br. pp. 10-11) that, construed as establishing a discriminatory preference for religious practices, the Randolph Amendment should nevertheless be deemed to have a "secular" purpose because it is merely a "clarifying" or "codifying" amendment to legislation outlawing discrimination. But that context and function cut the other way. Particularly in light of Senator Randolph's assurance that no more was intended than to assure "freedom from religious discrimination" (U. Br. p. 43), they militate against construction which creates a discriminatory perference for religious practices. Whatever may have been Senator Randolph's private understanding, it is hardly likely that "the whole Congress" understood "discrimination" in an Orwellian sense.

That inverted interpretation of "discrimination" was met and rejected in *General Electric Co.* v. *Gilbert,* 45 U.S.L.W. 4031. That case stands squarely for the proposition that it is not "discrimination" within the meaning of Title VII to withhold a benefit from the entire work force, even though the withholding has a more severe impact (or indeed its sole impact)

upon a class of employees which Title VII protects. See particularly *id.* at 4035, text and note at nn. 17 and 18.[4]

The purpose of § 701(j) can be said to be "secular" only if the "accommodation" requirement is construed as *non-discriminatory—i.e.,* as requiring accommodation of religious practices to the same, but to no greater, extent than the enterprise "accommodates" to secular needs, including secular reasons for absence. The test then would be—has the enterprise denied a request for accommodation on religious grounds which it would have granted if the same request had been predicated on a secular ground, *e.g.,* family needs.[5] The employer would have the burden of proof on that issue.

[4] In support of the contention (which several of our adversaries make) that an employer is required, if necessary to accommodate a Sabbatarian, to pay overtime to some other employee, COLPA Br. 33, n. 19, says: "In *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976), for example, this Court noted, but did not approve of, a 'cost-differential' defense. See 97 S.Ct. at 406 & n. 11." But footnote 11 merely quoted, as part of the statement of the case, a portion of the opinion of the District Court—which this Court reversed. It is footnote 17 which develops this Court's understanding of what it described in footnote 18 as the "longstanding meaning of 'discrimination' ", from which, it held, Congress in Title VII "did not intend to depart." We note also that the dissenting Justices in *General Electric* did not differ with the majority's principle that Title VII's antidiscrimination policy requires conditions of employment to be neutral on the basis of race, sex and religion, but rather on the application of this principle. They disagreed with the majority's "appraisal of General Electric's policy as a neutral process of sorting risks and 'not a gender-based discrimination at all' ", and with its refusal to give weight to the EEOC's views of the issue there.

[5] COLPA seems to be suggesting the same standard when it argues (Br. p. 9), that the adjustment required "has been magnified out of all proportion" because employers "customarily adjust work schedules to the medical, educational, and other personal needs of their employees," and "[r]eligious conviction is entitled to no less respect by employers and employees than medical necessity" (Br. p. 30). However, it shifts to a contrary position (*id.*, p. 9) when it analogizes § 701(j) to 29 U.S.C. § 793(a), which requires "affirmative action to employ and advance in employment qualified handicapped individuals." Apart from the fact that the quoted statute mandates preference only for "qualified" individuals, which religious observers who make themselves unavailable for work at required times, or for certain required work, manifestly are not, COLPA overlooks that there is no Establishment Clause bar against discriminatory preference for persons handicapped physically, or by "age, sex or * * * prior criminal record" (*id.*, p. 10, 12).

It is sheer sophistry to argue, as COLPA does (pp. 16-17), that because a preference can be justified as "reasonable" it is not a "preference." Nor can the preference for religion-oriented reasons for absence be explained away as non-discriminatory on the theory that such reasons are more "somber" (*id.*, p. 16) or "serious" (*id.*, p. 17) than unpreferred secular ones. Is the need of an employee to care for his bedridden parent on the nurse's regular Saturday off, for example, to be considered less "somber" or "serious" than the need of a religious observer? What if the nurse is a Sabbatarian?

The Government's argument (Br. pp. 50-51) that the favored treatment of religious observers is not "preferential" because it merely rectifies "discrimination" against them reflects the same fallacious, question-begging assumption that nondiscrimination is discrimination if it causes "a special burden others do not suffer," even though the "special burden" is the consequence only of relevant differences between the conduct of the burdened group and others.



This non-discriminatory standard would be consistent with the purpose of Title VII, and would not offend the Establishment Clause, because prohibition of *discrimination* against religious practices is consistent with "benevolent neutrality" (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970) )—the outer limit of permissible Government support of religious observance. See *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976) (Opinion of Blackmun, J.). The constitutional line must be drawn at discrimination in

its "longstanding meaning" (*General Electric Co.* v. *Gilbert, supra,* 45 L.W. at 4035, n. 18), because excuse of religious observers' non-performance of uniform, relevant job requirements, or declaration that, for them alone, relevant job qualifications are irrelevant, or not "sufficiently relevant" (Brief for the United States, pp. 20, 35, 36, 46, 49) is partiality—the antithesis of neutrality—the very advancement and support of religion (U.Br. p. 11), which the Establishment Clause prohibits.[6] Indeed, it has not heretofore been doubted

[6] Contrary to the implication of COLPA's Brief at pp. 6-7,the issue of discrimination turns on whether a neutral job requirement or qualification is pertinent or relevant to the work, not on whether it "can reasonably be avoided." *Griggs* did not define employment barriers as discriminatory simply because they were "unnecessary"; it reserved that definition for unnecessary barriers which were also "artificial," "arbitrary," and "invidious." 401 U.S. at 431. "Certainly, an employer can require that all of his employees * * * meet performance standards, and * * * try to insure compliance * * * so that job performance is not interfered with." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544-545 (1971) (Mr. Justice Marshall, concurring). COLPA later appears to recognize this when it asserts (Br. p. 12) that religious observance—unavailability to work when work is required—is "unrelated to employment qualifications"—and therefore constitutes "irrational discrimination". Inasmuch as availability for work when needed is obviously a natural and relevant condition of employment, and is universally understood by employers, employees, unions and arbitrators to be so, COLPA's contrary claim is sheer nonsense.

Equally fallacious is the Government's argument (Br. pp. 35, 46, 49, 51, 52), that uniform, regular attendance requirements may rationally be declared "artificial" and "irrelevant" as applied to religious observers only, unless their exemption would create "undue hardship." There is simply no basis in logic or in *Griggs* for substitution of the criterion "sufficiently relevant" for "relevant" or for equation of lack of "undue hardship" with "irrelevant." What is properly considered "artificial" and "arbitrary" is exemption of *religious* practices *only* from attendance and job performance requirements, for there is not even a pretense that the



that, as Mr. Chief Justice Burger put it in his dissenting opinion in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 801 (1973): "a discriminatory enactment favoring religious over nonreligious activities * * * would plainly be governmental sponsorship of religious activities * * *."

Thus, a construction of § 701(j) in harmony with the general antidiscrimination policy of Title VII, which §§ 703(h) and (j) reinforce, "go[es] in the direction of constitutional policy". *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1975) See U. Br. pp. 29-30, 42. Examination of our adversaries' constitutional arguments makes this all the clearer.

## II. CONSTITUTIONAL ISSUES

A. The arguments advanced by respondent and his *amici* are, in large part, warmed over versions of those which this Court analyzed and rejected in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 780-794 (1973) and *Sloan* v. *Lemon,* 413 U.S. 825, 831-834 (1973). Refutation appropriately begins, therefore, with recapitulation of those holdings. *Nyquist* and *Sloan* decided that state tuition reimbursement and tax credit plans for parents of children attending nonpublic elementary schools violate the Establishment Clause because they constitute forbidden support of religious activities—sending children to religious schools. That

effect on the employer or other employees of absence or nonperformance for religious reasons is any less or any different than identical absences for secular reasons. The argument that because Congress can outlaw subtle as well as obvious modes of discrimination against religion it can also discriminatorily immunize religious observers against the "consequences" (Gov't Br. p. 33), of non-discriminatory attendance policies, provided the impact of exemption is "minimal or can easily be avoided" (Gov't Br. p. 35) is a blatant *non sequitur*. Indeed, it is merely another form of the inversion of the meaning of the term "discrimination" which was discredited in *Gilbert*.

holding was bottomed squarely on the premise (413 U.S. at 780) that

> "It is clear from our cases that *direct aid* [to religious activities] *in whatever form* is invalid. As Mr. Justice Black put it quite simply in *Everson*:
>
> '*No tax in any amount*, large or *small*, can be levied to support any religious *activities* * * *'. 330 U.S., at 16." (Emphasis added.)

Thus, the Court found that aid to parents who send their children to parochial schools, though not in form a tax on those who do not, is condemned by the prohibition of taxation "to support any religious activities."

The Court identified the prohibited support as relief of parents' "financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools" (*id.* at 783). And it held that such relief is "direct aid" even though designed to promote "legitimate secular objectives", because it "also has the direct and immediate effect of advancing religion." *Id.*, at 783-784, n.39, and accompanying text. The Court explicitly rejected the contentions that such aid was permissible because bestowed on individuals rather than on religious institutions (413 U.S. at 781-783) and because it did no more than "equalize the [economic] position of parents who elect [parochial] schools" with those who elect public schools (*id.*, at 782, n. 38; *Sloan* case, *supra,* 413 U.S. at 834).

It was urged in *Nyquist* with respect to the freedom of poor parents to send their children to parochial schools, as strongly as it is here urged with respect to the freedom of employees to refrain from menial work on the Sabbath, that that is a right guaranteed by First Amendment and that aid designed merely to remove strangling economic barriers to that choice must



pass muster under the Establishment Clause because "it is designed to promote the free exercise of religion" (*id.*, at 788). The Court held that the conclusion does not follow from the premises (*id.*, at 788-789):

> It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e.g., Everson* v. *Board of Education, supra; Walz* v. *Tax Comm'n, supra,* and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. [Footnote omitted.] In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson* v. *Board of Education,* 330 U.S., at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline." *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

In several respects § 701(j) as construed by respondent and his *amici* is far more offensive to Establishment Clause principles than the *Nyquist-Sloan* aid programs. In the first place, those programs admittedly had unexceptionable secular purposes—"to perpetuate

a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools"—(*id.*, at 783). Apart from compelling discrimination in favor of religious practices on the pretext of "equalizing" employment opportunities, the accommodation requirement, as we demonstrated in our opening brief, pp. 52-53, has none.[7]

Secondly, in *Nyquist-Sloan* the same aid was provided to parents who sent their children to nonsectarian private schools as to parents who sent their children to parochial schools, so that support was not confined to religious practices, as it is here. Those cases, unlike this one, therefore, did not present "a discriminatory enactment favoring religious over nonreligious activities." 413 U.S. at 801, Mr. Chief Justice Burger, dissenting. Thus, features upon which that dissenting opinion was predicated are absent here. Cf. *id.* at 799-800, 804-805, with 782, n. 38. Nevertheless, the opposition argue this case as if the relevant *Nyquist* holdings were non-existent.

1. The basic theory of the opposition briefs is that because the Randolph Amendment stops short of imposing "undue hardship" it constitutes a "reasonable accommodation" of Free Exercise and Establishment Clause values. (See, *e.g.*, Gov't. Br. p. 20, Synagogue

[7] In *Yott* v. *North American Rockwell Corporation, et al.*, 14 F.E.P. Cases 445, 447-448 (C.D. Calif., Feb. 3, 1977), Judge Real characterized as "purely sophistry" the theory advanced by the majority in *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6 Cir., 1975), aff'd by an equally divided Court, 45 L.W. 4009, and implied here by the Government (Br. p. 33) and other adversary *amici*, that an "adequate secular purpose" can be ascribed to Section 701(j), construed as establishing a discriminatory preference, by attributing to it an intent "to put teeth in the existing prohibition of religious discrimination."



Council, p. 12). The theory is advanced by callous degradation of all interests and values but their own. Costs and practical difficulties to employers, legitimate concerns of unions and vital secular needs and desires of nonobserver employees are all contemptuously minimized. Typical is the Adventists' characterization (Br. p. 31) of the plight of senior employees forced to work on Saturdays as "end[ing] up with a schedule slightly less preferable from their point of view than the schedule they might otherwise have had." On balance, our opponents claim religious observers' needs are "reasonably" deemed to prevail over such "minimal" sacrifices.

But *Nyquist* leaves no room for "accommodations," however "reasonable," which provide "direct aid to religious activities" through taxation or expropriation of property or liberty of others. Argument designed to show the "reasonableness" of the quantum of protection afforded Sabbatarians and other religious observers against compulsion to choose between religious practices and compliance with job requirements are simply misdirected irrelevancies. Thus, in *Nyquist,* sending children to religious schools was recognized to be conscientious observance of a religious obligation; it was also undisputed that poverty acted as a severe deterrent to performance of that religious duty. Yet this Court held that measures designed to relieve the conflict by alleviating the financial hardship were inconsistent with the Establishment Clause, despite the substantial societal benefits from education of the religious observers' children at parochial schools and without stopping to inquire whether the amount of "equalizing" aid was "unduly" burdensome to other taxpayers. 413 U.S. at 782, n. 38.

Judge Real considered the "reasonable accommodation" theory in his recent decision in *Yott, supra,* 14 F.E.P. Cases, at 448. Characterizing "reasonable" relief of religious objectors from uniform job requirements as a "choice" the First Amendment does not allow, he said (*id.*):

> Government simply cannot make the choice—termed reasonable or otherwise—that [employer and union] conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because [employees'] religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment and its interpretation by the Supreme Court in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

It is argued (R. Br. pp. 7, 22; Gov't Br. pp. 23, 24; Adventists Br. pp. 16, 28, 30; A. 258) that because the cost of "accommodation" to the employer in money and inconvenience and to the Union and its constituents in denial of contract rights and benefits is small it is not "support * * * in a constitutionally significant sense" (Adventists Br. p. 39, n. 8).[8]

[8] It is also argued (Adventists Br. pp. 10, 29-31; COLPA Br. p. 23) that the cost and burden of "accommodation" should not be considered constitutionally "significant" because they may be no larger than the employer is required to incur to guard against racial or sex discrimination. The short answer is that, for reasons heretofore stated, pp. 12-15, *supra* (and not because the effect on religious observance is remote or incidental) prohibition of discrimination on religious grounds does not offend the Establishment Clause. That Clause, therefore, does not bar imposition of even heavy costs and burdens incidental to compliance with the valid statutory obligation. The same answer applies to the Adventists' argument (Br. pp. 12, 38), that benefit accruing to religious observers from accommodation is not forbidden "aid" because it does not differ from the benefit which inures to them from elimination of discrimination. One benefit is the product of partiality; the other of the "wholesome 'neutrality' of which this Court's cases speak * * *" (*Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222; see also *id.* at 226). "Neutrality is what is required." *Roemer* v. *Maryland Public Works Bd.,* 426 U.S. 736, 747 (Opinion of Blackmun, J.).



This quantum argument is irreconcilable with the "No tax," however "small" principle, p. 16, *supra,* quoting *Everson* and *Nyquist.* Cost and inconvenience to the employer aside, deprivation of a senior employee's option of preferred rest days off is a tax "in kind" (*Nyquist,* 413 U.S. at 803 (Burger, C.J., dissenting)) on a scarce benefit of industrial life.

What this Court said in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 225 (1963), is precisely applicable here:

> "Further, it is no defense to urge that the [aid to] religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson, supra,* at 65."

2. The premise of the argument that the accommodation requirement does not discriminatorily favor religious practices because it does not prefer those of one sect over another (R. Br. pp. 9, 16; Gov't Br. pp.

53, 54); and because it assertedly merely "equalizes" the position of Sabbatarians with that of Sunday worshippers (Synagogue Council Br. pp. 12, 14; COLPA Br. pp. 17-19) was explicitly rejected in *Nyquist, supra,* 413 U.S. at 782, n. 38, and is refuted by an unbroken line of decisions of this Court, summed up in Mr. Chief Justice Burger's characterization as "discriminatory" of legislation "favoring religious over nonreligious activities," *supra,* p. 15; U. Br. pp. 50-51.

Equally fallacious is the argument based on *Young* v. *Southwestern Savings & Loan Assn.,* 509 F.2d 140, 141 (5 Cir., 1975) (R. Br. p. 34, n. 21; Adventists Br. p. 32) that the Amendment involves no preference for religious over nonreligious activities because it protects atheists against compulsory attendance at religious services. In the first place *Nyquist* and its companion cases rejected the contention that benefits to parents who send their children to private parochial schools are valid under the Establishment Clause because the same benefits are given to parents who send their children to private non-sectarian schools.

Second, and even more significant, the facts in *Young* involve a genuine discrimination against the atheist because the employer required her to participate in a religious observance. Young's non-attendance at prayer meetings "did not affect in any way the employee's job performance" (Gov't Br. p. 39). Thus, unlike attendance at work, from which religious observers are excused, attendance at prayer meetings, albeit on Company time and property, is not work-related; in *Griggs'* terms, because irrelevant, it is an "artificial", "arbitrary" and "invidious" job requirement—and therefore truly discriminatory. See pp. 8-9, 14-15, n. 6, *supra.* There is simply no comparison between compulsory attendance at prayer meetings, a



requirement we assume the opposition would concede Government cannot constitutionally impose on its own employees (cf. *Schempp,* case, *supra*), and compulsory attendance at work on religious holidays, which the Government (by implication, Br. p. 42), admits *can* constitutionally be required of religious observers.

Finally, the relevant comparison for Establishment Clause purposes is not between religious practices which impact on work performance and irreligious or nonreligious ones which do not, but between religious needs and secular needs which impact equally on work performance. From this *relevant* viewpoint, the reality of discrimination is undeniable.[9]

3. Synagogue Council argues (Br. p. 17) that the "facilitation of religious activity" is "only indirect[ ] and minimal[ ]," because accommodation does not require the excused employee

> "to go to church on Saturday; he can sit home and watch television all day if his religious commitment permits him to do so. Moreover, * * * non-participation in an abortion or blood transfusion

[9] In *Yott* v. *North American Rockwell Corp., supra,* Judge Real illustrated the discriminatory operation of the accommodation requirement. He said (14 FEP Cases at 448):

> The excuse of an employee from union membership or the payment of union dues as a condition of employment *because* of his religious objection affords that employee a privilege not otherwise available to those employees whose religious beliefs or lack of religious beliefs provide no such excuse. For instance, employee "A" may harbor political beliefs every bit as strong and compelling as YOTT's unquestioned religious objections to union activity; yet employee "A" cannot qualify for the required accommodation of § 2000e(j) claimed by YOTT. Given the same evidence the reasonableness of the accommodation that would be required of an employer is indistinguishable between employee "A" and YOTT. The only reason ascribed by § 2000e(j) for its application to YOTT and not employee "A" is religion vs. politics.

procedure, for example, in no way *facilitates* religious activity." (Emphasis added.)

The short answer is, of course, as COLPA's Brief (p. 3, n. 3 and accompanying text) demonstrates, that the "religious commitment" is *only* to perform no menial labor on Saturday, and that nonparticipation for religious reasons in an abortion or blood transfusion procedure is likewise adherence to a religious commitment.

4. Adventists argue (Br. pp. 30-31), that if the pay for time off to vote requirement in *Day-Brite Lighting Inc.* v. *Missouri,* 342 U.S. 421 (1952), "did not constitute forbidden compelled support of the political preferences of employees," the accommodation requirement cannot be forbidden support of employees' religious practices. This Court shattered that "argument 'by analogy' " when it was recently drawn to attack, on First Amendment grounds, the public financing of election campaigns. *Buckley* v. *Valeo,* 424 U.S. 1, 92-93 (1976).[10]

[10] "We have, of course, held that the Religion Clauses—'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'—require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion. E.g., *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222-226 (1963). The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions. E.g., *Everson* v. *Board of Education,* 330 U.S. 1, 15-16 (1947). See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). But *the analogy is patently inapplicable to our issue here.* Although 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather *to use public money to facilitate and enlarge* public discussion and *participation in the electoral process, goals vital to a self-governing people* [footnote omitted]. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93 (emphasis added).



Contrary to Adventists Br. p. 31, "the reasonable accommodation principle" does *not* simply "allow[ ] each religious sect to 'flourish according to the zeal of its adherents and the appeal of its dogma.' *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952)". Instead it assists some religious sects to "flourish" by enabling their "adherents" to conscript *nonadherents* to perform their work in order that the adherents may practice the religion despite their lack of sufficient "zeal" to make the sacrifices observance naturally entails.

B. The opposition argues as if the exemption cases conflict with the principles of *Nyquist.* But since they antedate *Nyquist,* this Court obviously considers them distinguishable (as does Mr. Pfeffer in his capacity as scholar, see U. Br. p. 59).

Exemption of religious observers from obligations imposed by law has been required or tolerated when the obligations impel or impede conduct conversely forbidden or required by religion or where non-exemption would injure religion as much as exemption would aid it. Exemption in these contexts poses a Religion Clause dilemma for the State as lawmaker which is absent when obstacles to religious practice derive from the exigencies of life rather than from a law. The "aid" to religious practice or observance embodied in such exemptions, therefore, does not reflect *mere* promotion of "free exercise values"; it reflects instead a far more basic consideration—restraint of Government impairment of free exercise.

For example, in *Zorach* v. *Clauson,* 343 U.S. 306, school attendance was compelled by law. Government totally regulated "the temporal and geographic environment (*Abington School District v. Schempp,*

374 U.S. at 226, n. 10), of school children during the day, preempting time available for religious instruction. Release of a portion of that time constituted an exemption, *pro tanto,* from government regulation.[11]

*Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), similarly, involved exemption from a law-imposed education requirement. State law compelled what the Amish religion forbade.

The observations in *McGowan* v. *Maryland,* 366 U.S. 420, 459 (1961), and *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (1961), approving exclusion of Sabbatarians from Sunday Closing laws again involved exemption from laws which *themselves imposed disproportionate economic hardships* upon adherents of particular religions.

The holding that Sunday Closing laws do not violate the Establishment Clause are irrelevant to Hardison's thesis, for they rest on the assumption that those laws had a valid secular purpose *only* and that assistance to religious observance was therefore "only a remote and incidental effect." *Nyquist, supra,* 413 U.S. at 784, n. 39. The same is true of the conscientious objector cases, as we showed in our opening Brief, pp. 77-79. These cases, therefore, lend no support whatever to the proposition (Gov't Br. p. 47, n. 29, see also, *id.,* 37-38) that Government may *directly* require others "to

[11] It is interesting to note that the Government's Brief, p. 43, ignores the demonstration in U. Br. p. 72, n. 43, that "a majority of the Court assumed that no hardship or burden was imposed upon those who opted against release," and persists in treating Mr. Justice Jackson's factual speculations in dissent as if they had been incorporated into the majority's decision. The premise on which the Government asserts that *Zorach* "answers [our] contention" (*id.*) is thus, quite simply, false.



adjust [their] own conduct," *i.e.,* to sacrifice property or liberty to facilitate, "religious practices of others."[12]

Finally, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), involved exemption of Sabbatarians from the obligation of accepting jobs requiring work on Saturday as a condition of receiving unemployment benefits. As we demonstrated at U. Br. pp. 74-75, inclusion of Sabbatarians in the face of the various exemptions of Sunday worshippers and others made the law discriminatory, not "facially neutral", as the Government erroneously asserts (Br. p. 38), and the result may rest on that alone. But assuming, arguendo, the broadest possible interpretation, nonetheless what was at stake was a benefit provided by state law, and it was state law which compelled Sabbatarians "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand" (*id.*). This Court decreed exemption of Sabbatarians from that law because it found that inclusion *infringed* the guarantee of *free exercise*; not merely because it would "promote

[12] In support of that proposition the Government also cites (Br. p. 43, n. 14) the sustaining by this Court in *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617, 627 (1961), of a law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays. The short answer is that that law deprived no one of any property or liberty. The public has no more judicially cognizable interest in disrupting religious services by engaging in the prohibited activities on the universal day of rest than it has "a right to enter [a] cathedral and disrupt the church services * * *." *Action* v. *Gannon,* 450 F.2d 1227, 1233 (8 Cir. 1971). Inasmuch as "accommodation" does entail expropriation of property and liberty, arguments from *Gallagher* and *Action* (Adventists Br. p. 22) are unavailing.

free exercise values." See the discussion, 374 U.S. at 405-406, analogizing to *Speiser* v. *Randall,* 357 U.S. 513 (1958), a tax exemption case.

Thus, the argument by analogy—that because Government can promote "free exercise values" by exemptions such as these, it must be able to promote those values by compelling private persons discriminatorily to accommodate religious practices—is falsely bottomed.

Mr. Justice Jackson, in his dissenting opinion in *Everson* v. *Board of Education*, 330 U.S. 1, 25 (1947), appears to have forseen the distinction between *Sherbert* and this case. Government, he said, "may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed." Government may compensate Sabbatarians for loss of employment resulting from refusal to accept jobs requiring work on Saturday, but it cannot guarantee them Saturdays off from jobs in which Saturday work is required, because that is to "compensate them," or compel others to compensate them, "for adherence to a creed."

Adventists tacitly concede that exemption of religious observers from hardships they confront in life must be distinguished from exemption from hardships imposed by law for they argue (Br. pp. 9-10, 22-23), that the so-called "discriminatory" impact of work scheduling on Saturday is "largely the product of governmental action" and they justify exemption as "ameliorating the effects of governmental action." There are three answers. First, as we observed at U. Br. p. 77, the Randolph Amendment cannot be defended on the theory that it is designed to eliminate



"discrimination" between Sabbatarians and Sunday worshippers, for it applies as much to enterprises (like T.W.A. and the Postal Service) which operate on a seven day as a five day or six day basis and as much in states without and with a Sunday Closing law. Second, if elimination of discrimination between Sabbatarians and Sunday worshippers were its purpose, the Amendment would not be saved thereby, because the Equal Protection Clause cannot be invoked to sustain a program violative of the Establishment Clause. *Sloan* v. *Lemon,* 413 U.S. 825, 834 (1973). The violation of the Establishment Clause, as we have shown, inheres in the advancement and preference of religious over secular practices and causes of absence. Third, and most decisive, the requirement that employees work on a sixth day manifestly stems entirely from the business needs of particular enterprises and cannot rationally be attributed to either Sunday Closing laws or the practices of Government agencies, for Government agencies, unlike private enterprises, generally work a five, not a six, day week. The impact of Saturday work requirements on Sabbatarians, therefore, is not rationally attributable to Government, however "indirectly" (Adventists Br. p. 24), in its capacity either as law giver or employer, without obliterating the "essential dichotomy" between action which is attributable to Government and action which is not. *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 349 (1974); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 171-179 (1972).

C. Adversary counsel assume as a given that Section 701(j), as applied to Government in the role of employer, would face no Establishment Clause hurdle (Gov't Br. pp. 18-19, 38-44; Adventists Br. p. 41;

COLPA Br. p. 10).[13] They reason that an accommodation to "free exercise values" which Government may make in its own enterprises without violating the Establishment Clause, it must be able to compel private employers and employees to make without offending that Clause.

That conclusion would not follow from the premise even if the premise were sound, which, as we shall now show, it is not. To have validity, the argument must be bottomed on the unarticulated assumption that, *vis-a-vis* its own employees, Government is confronted with a Religion Clause dilemma, *i.e.*, subjecting religious observers to nondiscriminatory scheduling, which creates conflict between religious observance and job requirements, on the one hand, or exempting them to avoid such conflict, on the other. If in fact this dilemma existed and those *were* the only alternatives, arguably exemption might be tolerated, provided other employees were not divested of liberty or property in the process, despite the offense to Establishment Clause values. But, on that very assumption, it is self-evident that application of the Randolph Amendment to private industry must fall, for the assumed dilemma which confronts Government in dealing with its own employees simply does not exist *vis-a-vis* private employment. Government need take *no* position with respect to work schedules or job attendance requirements of religious observers in private enterprise; it could hardly be

[13] They point out, indeed, that the Civil Service Commission (undoubtedly at the instigation of the Equal Employment Opportunity Commission) has adopted such a regulation, 5 C.F.R. § 713.204(g). (Gov't Br. p. 3, n. 1; COLPA Br. p. 30) That regulation, adopted October 21, 1972, is applicable, among others, to the United States Postal Service, the Government employer involved in *Dawson* v. *Mizell*, 325 F.Supp. 511 (E.D. Va., 1971).



argued that continuation of the pre-1972 Government "hands-off" policy, p. 33 *infra*, poses any "free exercise" issue. Thus, the sole assumed justification for encroaching upon Establishment Clause values in private industry is entirely lacking.

But examination discloses that the "dilemma" assumption vis-a-vis government employees is false. In the first place, Government, as employer, has the same needs and confronts the same scheduling, production and other employee relations problems as any other employer. It is entitled to deal with those problems like any other employer, by adopting and enforcing rational, uniform, rules and policies, consistent with its interests as employer and compatible with the needs of the exclusive bargaining agent of its employees, if any. In *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961), this Court, assuming that Brauner "could not constitutionally have been excluded from the Gun Factory * * * because she was * * * a Methodist," went on to hold: "It does not follow, however, that [she could not have been excluded] when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M&M." By parity of reasoning, while one cannot constitutionally be denied Government employment because of membership in the Seventh Day Adventists or the Worldwide Church of God, it does not follow that he cannot constitutionally be denied Government employment because he refuses to appear at work on days he is non-discriminatorily scheduled to do so.

"Free exercise values" do not require Government as employer, any more than they require any other employer, to create costly, burdensome and discriminatory exceptions to uniform schedule and work re-

quirements, which are relevant to operation of a Government enterprise, to facilitate religious practices of some or any employees. And because that is true, the Establishment Clause forbids Government as employer to make such discriminatory exceptions, particularly if they impact adversely on contract rights or liberties of other employees. We, therefore, disagree completely with the position taken at oral argument by petitioner's counsel in *Cummins* (Tr. pp. 45, 46), upon which COLPA relies (Br. p. 31), that "in order to avoid infringement upon free exercise [the Government] would have to make allowances." As for our opposition's argument that the adverse impact of neutral scheduling and work requirements upon Sabbatarians' employment opportunities creates a free exercise problem, the short answer is that the problem is created by the Sabbatarians' adherence to religious practices which disqualify them for certain jobs and that Government cannot constitutionally remove that disqualification by measures which violate the Establishment Clause.

The second answer is that unlike the question of taxation or exemption of religious property, where Government *is* faced with an "either-or" dilemma, accommodation of religious absences is not susceptible of solution only by creating a discriminatory exception for Sabbatarians and other observers. Accommodation can be made by rules which recognize and treat impartially religious and secular needs and causes of absence. Allowance of absence on such a non-discriminatory basis of course would not offend the Establishment Clause.

The Synagogue Council points (Br. p. 21) to the "widespread" practice "of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations" as "strong evidence of its constitutionality." But the statutes and regulations it cites, reproduced in our *Appendix, infra,* establish that the practice is *not* to grant a *discriminatory* preference to religious observers but to treat absences for secular and for religious reasons nondiscriminatorily, on exactly the same basis. For example, New York grants government employees "personal leave" not to exceed five days a year, which is defined as leave "for personal business *including religious observance,*" p. 2a, *infra,* emphasis added.



This *actual* practice may be considered "strong evidence" that a discriminatory preference for religious absence would have been deemed violative of the Establishment Clause. At the very least, it confirms that until 1972, when the Civil Service Commission adopted the EEOC Guidelines, Governments generally, including the United States, found no just reason or legitimate justification for discriminatory preference of religious observers. *Dawson* v. *Mizell, supra.* Other than Senator Randolph's reference to diminishing attendance at the Sabbath services of certain sects, no relevant change of circumstances has been suggested.

D. 1. In contending that § 701(j) does not breach the nonentanglement requirement of the Establishment Clause, the *amici* uniformly misstate the issues which confront employers (and unions) when they are called upon to "accommodate", and Government tribunals when they are called upon to adjudicate cases under §701(j). For while the *amici* acknowledge that the sincerity of the religious claim may sometimes be called into question (a problem whose difficulty they

treat far too cavalierly), they say that the principal problem in applying § 701(j) will turn on issues of industrial affairs, and will not involve the interpretation or evaluation of religious beliefs. But the inquiry under § 701(j) is simply not so limited, as the words of the §701(j) test, "undue hardship", themselves make clear. Assuming, for the moment, that the imposition of any "hardship" on one person to facilitate the religious observance of another is constitutional, the question whether the hardship is "undue" necessarily involves evaluating the respective importance of the interests of the affected parties. Respondent, at least, recognizes this:

> "The amendment is far from rigid; rather, it takes into consideration the individual circumstances of each case and thereby is a proper balance between the rights and duties of the employer to function in the business world without discriminating and the rights and duties of an employee to freely exercise his religion and be able to compete equally in the job market." (Resp. Br. 23). See also, *id.* at 27.[14]

We know of no principled standards by which either an individual or Government can determine "the

[14] Of course, if the amendment were more "rigid" and, instead of creating a balancing test, established an absolute duty in all cases to defer to an employer religion-based claim, the seriousness of the burden on the employer and any affected employees would be aggravated. This, in turn, would compound the violation of the employer's and the employees' right not to be taxed, directly or indirectly, to support the religious observance of another person. Legislation which departs from the neutrality principle by favoring—even under the soft euphemism of relieving the burdens of—religious observance, is inevitably impaled on one of the horns of this dilemma.



proper balance". It is inherent in their nature that religious values and economic values are not interchangeable; there is no common currency or other single value system into which they can be transmuted to make comparison possible.[15]

The difficulty is particularly severe if §701(j) is construed to require the rights of some employees to yield to the interests of other employees to engage in religious observance. How is it to be determined whether an employee's interest in not working on his Sabbath is entitled to greater respect or protection than a fellow employee's interest in sharing the company of his working spouse on one of the two days of the weekend? Is the choice to which the Sabbatarian is put if he must work on Saturday or lose his job more onerous than that of the single parent who cannot work on Saturday because he or she has no one to take care of the children? Does the obligation of one employee to accommodate the religious observance of another include paying for child care so that the parent can perform work which the Sabbatarian refuses?

[15] To be sure, there are cases in which the courts have balanced an individual's right to engage in conduct in the exercise of religion against society's interests in preventing such conduct. The difficulty and sensitivity in those cases should itself serve as a caution. But grappling with the problem, no matter how imperfectly, is unavoidable unless the demands of religious observance are to be exalted above all other interests, an alternative which this society cannot tolerate, or that they be subordinated entirely, an alternative which would nullify the Free Exercise Clause. But § 701(j) imposes an obligation to balance where none would exist if Congress had respected this Court's consistent holding "that the [Establishment] clause withdrew all legislative power respecting religious belief or the expression thereof." *Abington School District* v. *Schempp*, 374 U.S. at 222.

Moreover, § 701(j) makes examination of the tenets of the religion unavoidable. Respondent says

> "An individual's religious beliefs and practices must give way, if he wishes to remain employed, if an employer can demonstrate that these practices are unreasonable or that the practice places an undue hardship on the employer." (R. Br. p. 38).

And one *amicus* admits that "Section 701(j) obligates an employee to cooperate with his employer's efforts to make a 'reasonable accommodation' " (COLPA Br. 24). Whether an accommodation is "reasonable" may well depend on the importance of a particular observance in the mosaic of an employee's particular set of religious beliefs. There is in many, if not all, faiths a hierarchy among religious observances. For example, in the Jewish religion the New Year and Yom Kippur are known as the high holy days and their observance is regarded as a more strict duty than the observance of lesser holidays (like Purim) in the calendar. And there are also differences among adherents of particular faith as to the importance which they individually attach to particular observances.

The hypothetical example at Adventists Br. pp. 33-34, though apparently constructed to be trivial, is suggestive. To some observers, a pilgrimage to Mecca, Jerusalem or some other holy place is a religious imperative; to others, it is not a command but a highly valued religious experience. Are both equally entitled to accommodation? If so, the individual judgments of religious observers would be elevated above the interests of other employees. If not, what calipers are sufficiently sensitive to measure the degree of the observer's need? Finally, contrary to the Adventists' implication, to some, though not to all, it *does* matter when a pilgrimage is made. The benediction "next year in Jerusalem" symbolizes the importance which some Jews attach to being in the Holy City at the time of the Passover.



2. While Adventists on the one hand claim (Br. 45), that it is "highly doubtful" that the resentment of employees discriminated against in favor or religious observers will "lead to potential divisiveness in the relevant social and political sense," they assert on the other that "accommodation" will remove "a much more significant source of divisiveness" (*id.* p. 46) the economic burdens religious observers otherwise bear. This court answered that proposition in *Nyquist* by referring to the wisdom of Mr. Justice Black's prophecy that concession to demands to ease the economic burden of religious observers lead not to quiescence but to further demands. 413 U.S. at 784-785.

## CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed with direction to dismiss the complaint.

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
1900 M Street, N.W.
Washington, D. C. 20036

MICHAEL D. GORDON
1125 Grand Avenue
Kansas City, Missouri 64106

*Attorneys for Petitioners*
*International Association of*
*Machinists and Aerospace*
*Workers, et al.*

# APPENDIX



## APPENDIX

Statutes and Regulations cited in Synagogue Council Brief, p. 21, as establishing "the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations."

Conn. Gen. Stat. § 5-250(c):

> (c) In addition to annual vacation, each appointing authority shall grant to each full-time permanent employee in the state service *three days* of personal leave of absence with pay in each calendar year. *Personal leave of absence shall be for the purpose of conducting private affairs, including observance of religious holidays,* and shall not be deducted from vacation or sick leave credits. Personal leave of absence days not taken in a calendar year shall not be accumulated. (Emphasis added)

Fl. Stat. Ann. § 231.40(1)(c)(sic) should be 231.40(1)(b):

> (b) A school board may establish policies and prescribe standards to permit a member of the instructional staff to be absent *4 days* each school year *for personal reasons.* However, such absences for personal reasons shall be charged only to accrued sick leave, and leave for personal reasons shall be noncumulative. (Emphasis added)

In 1970, the above words "personal reasons" were substituted for "religious holidays".

N.J. Rev. Stat. 11:14-8:

> Administrative leave of absence may be used only at a time convenient to and approved in advance by the appointing authority; provided, however, that administrative leave of absence allowed for a religious

observance shall be granted on the days and hours required insofar as the same may be granted without interference with the proper conduct of government functions.

This statute should be read in conjunction with N.J. Rev. Stat. 11:14-6:

> In addition to leaves of absence authorized pursuant to chapter 14 of Title 11, Civil Service, and supplements thereto, all employees in the classified service of the State service and those employees of Rutgers, The State University, Newark College of Engineering, and the College of Medicine and Dentistry of New Jersey whose counterparts in the New Jersey State colleges are or would be in the classified service shall be entitled to administrative leave of absence for not less than 3 days per calendar year for *personal business, including religious observances.* Administrative leave shall not be charged against accumulative vacation leave or overtime credits. (Emphasis added)

N.Y. Civ. Serv. Rules and Regs. § 21.6:

> 21.6 Personal leave. (a) Personal leave is leave with pay *for personal business including religious observance,* without charge against accumulated vacation or overtime credits. Employees shall be entitled to personal leave not exceeding a total of five days in a year. (Emphasis added)